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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10

11 OMAR RODRIGUEZ; CINDY GUILLEN-
GOMEZ; STEVE KARAGIOSIAN;
12 ELFEGO RODRIGUEZ; AND JAMAL
CHILDS,

13 Plaintiffs,

14 -vs-

15 BURBANK POLICE DEPARTMENT; CITY
16 OF BURBANK; AND DOES 1 THROUGH
100, INCLUSIVE.

17 Defendants.
18

19 BURBANK POLICE DEPARTMENT; CITY
20 OF BURBANK,

21 Cross-Complainants,

22 -vs-

23 OMAR RODRIGUEZ, and Individual,

24 Cross- Defendant.
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27
28

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge
Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION *IN LIMINE* NO. 4
TO EVIDENCE OR ARGUMENT RELATING
TO DISCIPLINE IMPOSED AGAINST
BURBANK POLICE DEPARTMENT
MEMBERS FOR ANYTHING OTHER THAN
HARASSMENT OF KARAGIOSIAN AND
DISCIPLINE OF FORMER CHIEF STEHR
FROM TWENTY YEARS AGO

Final Status Conference:

DATE: June 8, 2011
TIME: 9:00 a.m.
DEPT: 37

Trial Date: June 8, 2011

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. DEFENDANT HAS PLACED THE DISCIPLINE OF OFFICERS IN ISSUE**

3 In its Motion *in Limine* No. 4 Defendant seeks to exclude evidence of discipline of Burbank
4 Police officers for anything other than harassment of Plaintiff Steve Karagiosian. Judge Wayne has
5 not yet ruled on Plaintiff's *Pitchess* motion with respect to Karagiosian. Thus, Defendant's motion
6 *in limine* should not be granted on the grounds that the *Pitchess* procedure has not been followed

7 In this action for harassment and failure to take reasonable steps to prevent harassment under
8 California's Fair Employment and Housing Act ("FEHA"), Defendant City of Burbank raised the
9 "avoidable consequences" doctrine as its second affirmative defense, alleging:

10 The employer took reasonable steps to prevent and correct workplace harassment, but
11 Plaintiff(s) unreasonably failed to use the preventative and corrective measures provided by
12 the employer and reasonable use of the employer's procedures would have prevented at least
13 some, if not all, of the harm Plaintiff(s) allege she or he purportedly suffered.

14 (Answer to First Amended Complaint, p.2, ll.11-15.)

15 Such a defense places in issue previous acts of harassment, whether directed toward Plaintiff
16 or others, **and Defendant's responses thereto, including the discipline of other officers or the**
17 **lack thereof.** In *State Dept. of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, the court
18 explained:

19 [T]o take advantage of the avoidable consequences defense, the employer ordinarily
20 should be prepared to show that it has adopted appropriate antiharassment policies . . . In a
21 particular case, the trier of fact may appropriately consider whether the employer prohibited
22 retaliation for reporting violations, whether the employer's reporting and enforcement
23 procedures protect employee confidentiality to the extent practical, and whether the employer
24 consistently and firmly enforced the policy. Evidence potentially relevant to the avoidable
25 consequences defense includes **anything** tending to show that the employer took effective
26 steps "to encourage victims to come forward with complaints of unwelcome sexual conduct
27 and to respond effectively to their complaints." (Grossman, *The First Bite Is Free: Employer*
28 *Liability for Sexual Harassment* (2000) 61 U.Pitt. L.Rev. 671, 696.) "[I]f an employer has

1 failed to investigate harassment complaints, [or] act on findings of harassment, or,
2 worse still, [has] retaliated against complainants, future victims will have a strong
3 argument that the policy and grievance procedure did not provide a 'reasonable
4 avenue' for their complaints." (*Id.* at p. 699.)

5 (*State Dept. of Health Services, supra*, at pp.1045-1046, emphasis added.)

6 The court continued:

7 A conscientious employer will quickly stop the misconduct of which it becomes aware.
8 Prompt employer intervention not only minimizes injury to the victim, but also sends a clear
9 message throughout the workplace that harassing conduct is not tolerated. Employers who
10 take seriously their **legal obligation** to prevent harassment are an employee's best protection
11 against workplace harassment.

12 (*Id.* at p.1049, emphasis added.)

13 Thus, under *State Dept. of Health Services*, "the trier of fact may appropriately consider"
14 previous acts of harassment directed both at Plaintiff **and at others**, and Defendant's responses
15 thereto.

16 If "[e]vidence potentially relevant to the avoidable consequences defense includes **anything**
17 tending to show that the employer took effective steps 'to encourage victims to come forward with
18 complaints of unwelcome [harassment] and to respond effectively to their complaints,'" then it
19 follows that relevant evidence also includes **anything** that shows that the employer failed "to
20 encourage victims to come forward with complaints of [harassment] and to respond effectively to
21 their complaints." This includes evidence of previous acts of harassment toward Plaintiff **and**
22 **others** and Defendants responses thereto.

23 Furthermore, one of the policies behind FEHA is to deter future harassment by the same
24 offender or others by prompt effective action. In *Doe v. Starbucks, Inc.* (C.D. Cal. Dec. 18, 2009)
25 2009 U.S. Dist. LEXIS 118878, the court explained:

26 Section 12940(k) requires that an employer take all reasonable steps necessary to prevent
27 harassment. In an analogous Title VII situation, the Ninth Circuit has held that "[o]nce an
28 employer knows or should know of harassment, a remedial obligation kicks in. That

1 obligation will not be discharged until action - prompt, effective action - has been taken.
2 Effectiveness will be measured by the twin purposes of ending the current harassment and
3 deterring future harassment - **by the same offender or others.**" Fuller v. City of Oakland, 47
4 F.3d 1522, 1528 (9th Cir. 1995) (citations omitted). "The affirmative and mandatory duty to
5 ensure a discrimination-free work environment requires the employer to conduct a prompt
6 investigation of a discrimination claim." Am. Airlines, Inc. v. Superior Court, 114 Cal. App.
7 4th 881, 890, 8 Cal. Rptr. 3d 146 (2003), reh'g denied and review denied 2004 Cal. App.
8 LEXIS 147 (2004).
9 (*Doe v. Starbucks, Inc.*, *supra*, at pp. 34-35, emphasis added.)

10 This policy to deter future harassment, by the same offender or others by prompt effective
11 action, places in issue whether past instances of harassment, whether directed toward plaintiff or
12 others, were met with prompt effective action. Thus, instances of past harassment directed toward
13 individuals other than Plaintiff, and Defendant's responses thereto, are admissible.

14 Thus, Defendant's motion should be denied.

15 **IV. DEFENDANT HAS FAILED TO SHOW ANY**
16 **REAL PROBABILITY OF UNDUE PREJUDICE**

17 Defendants argument that such evidence should be excluded because it would be unduly
18 prejudicial is unpersuasive. *Bihun v. AT&T Information Systems, Inc.*(1993) 13 Cal. App. 4th 976,
19 was a sexual harassment action in which the defendant moved to exclude evidence of his
20 relationships with women at work on the grounds that such evidence was unduly prejudicial under
21 Evidence code §352. The court disagreed, stating:

22 While the challenged evidence may have supported the testimony of [plaintiffs], it is not
23 "unduly prejudicial" for that reason. "The 'prejudice' referred to in Evidence Code section 352
24 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an
25 individual and which has very little effect on the issues. . . . 'Prejudicial' is not synonymous
26 with 'damaging.' " (People v. Yu (1983) 143 Cal.App.3d 358, 377 [191 Cal.Rptr. 859].) We
27 fail to see how a plaintiff can prosecute an action for sexual harassment against a corporate
28 employer without introducing evidence of sexual harassment by an employee. To say this

1 evidence is unduly prejudicial because it "brands" the employee as an "harasser" is like
2 saying evidence the defendant committed a murder is unduly prejudicial because it "brands"
3 the defendant as a "murderer."

4 (*Bihun*, *supra*, at pp. 989-990, disapproved on other grounds in *Lakin v. Watkins Associated*
5 *Industries* (1993) 6 Cal. 4th 644, 664.)

6 Likewise, in the case at bar, evidence that Burbank Police officers wee or were not
7 disciplined for using racial slurs is not unduly prejudicial just because it support Plaintiff's claim that
8 he was harassed for being an Armenian. It is also not prejudicial just because is it supports
9 Plaintiff's claims that Defendants failed to take reasonable steps to prevent harassment.

10 Defendants' motion should therefore be denied.

11 12 **III. CONCLUSION**

13 For all the foregoing reasons, Plaintiff respectfully requests that Defendants' motion *in limine*
14 No. 4 be denied.

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16 DATED: May 20, 2011

LAW OFFICES OF RHEUBAN & GRESEN

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20 Attorneys for Plaintiff, Steve Karagiosian
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